No. 77-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

MARY P. LAFFEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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TABLE OF AUTHORITIES

CASES:

STATUTES:

MISCELLANEOUS:

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Introduction

In attempting to discourage the Court from granting certiorari, respondents suggest that this case is a hopeless morass in which the issues tendered by Northwest are new to the case and depend upon a rejection of the findings by the courts below. Neither point is founded.

Northwest does not seek to have a single finding overturned by this Court. The issues in this case turn, not on redetermination of basic facts, but on assessment of their legal significance. The argument that the legal issues were not adequately raised or preserved in the courts below simply flies in the face of the fact that the questions presented are directed solely to issues *actually decided* — erroneously, we contend — by the courts below.

Although respondents seek to paint a picture of Northwest as having been found to have intentionally engaged in a calculated plan to discriminate against women, they ignore the critical factual finding on this central issue. The district court as trier of fact expressly found that Northwest had acted *in good faith* and had not intentionally based the purser/stewardess pay differential on sex:

> "The Defendant did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. . . . The Court does not find an intentional, bad faith attempt to evade the law." (Pet. App. 1b-2b.)

A brief discussion of the seven factual premises that respondents argue are the unsupportable predicates for the petition will show that respondents have either misperceived our points or erred in contending that the pertinent premises are not supported by the record.

First, respondents argue that it is "not true" that Northwest regularly has employed male cabin attendants at the same pay as stewardesses (Br. in Opp. 3). The present employment of male FSA's, however, is not the relevant consideration. What is critical is that, during the period predating the Equal Pay Act, there was a pay differential between the position of purser, on the one hand, and the positions of female stewardess and male FSA on the other. This established dichotomy, with

men on both sides of the pay differential, continued for many years after passage of the Act and demonstrates that the pay differential was not sex-based. We argue that this history establishes that the differentials between pursers and other cabin attendants were not discriminatory within the meaning of the Act. *Cf. Hazelwood School District* v. *United States*, 97 S. Ct. 2736, 2443 (1977) ("the employer must be given an opportunity to show 'that the claimed discriminatory pattern is a product of pre-Act [employment practices] rather than unlawful post-Act discrimination'"). Here, there is no question that the pay differential was legal when adopted, was *not* the product of discriminatory practices, and was not "based" on sex.[1]

Second, respondents argue (Br. in Opp. 4) that the courts below found that pursers did not have distinct "supervisory authority." That is not correct. The existence of that supervisory authority over stewardesses was expressly found by the courts below (Pet. App. 48a-51a; Pet. App. 15c-16c, 37c-39c), and the issue raised here is purely one of law: whether the courts below applied the correct legal standards in discounting the relative significance of the supervisory relationship between pursers and other cabin attendants, including both stewardesses and FSA's.

Third, respondents contend (Br. in Opp. 4) that there is no evidence that their union and Northwest ever addressed the issue whether the pay differential between pursers and stewardesses was justified by any differences in duties. The job differences, however, were set forth in the collective bargaining agreement (Pet. App. 6a-7a, ¶¶ 10-11), and, as the district

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[1] Respondents' assertion that there are no longer any male FSA's is disingenuous at best. They fail to mention the finding of the district court that Northwest recently had hired male cabin attendants as "stewards" to perform "the same duties as stewardesses and FSA's" and that "[a]t all times from 1949 to the present, FSA's and stewards have been compensated at the same rate as stewardesses of equal longevity" pursuant to "the same union negotiated and agreed upon rate of pay" (Pet. App. 9a, ¶ 21).

court expressly held (Pet. App. 1b-2b), no one had ever suggested during negotiations that Northwest's belief that the jobs were materially different was erroneous. Instead, all of the efforts by the union were directed toward opening *promotional* opportunities from the stewardess position to the purser position. These facts showing the behavior of interested parties clearly demonstrate that Northwest and the stewardesses' union both shared a common assumption that the jobs were different.[2]

Fourth, respondents allege that "despite Northwest's protestations of innocence and 'good faith,' the courts below found that Northwest had engaged in a pervasive pattern of discrimination . . ." (Br. in Opp. 5). This assertion inexplicably ignores the basic factual finding by the district court (Pet. App. 1b-2b) that Northwest had proven that the pay differential between pursers and stewardesses was actually based on a good faith belief that the two positions were different, rather than on a desire to discriminate against women.

Fifth, raising a straw man, respondents insist that the record does not support an argument that the courts below were "somehow biased" against Northwest (Br. in Opp. 5). Northwest, however, is making no such argument. The point we

[2] Attempting to rebut the inevitable inferences from the district court's finding that the membership of the cabin attendant unions that negotiated these agreements was "predominantly female" (Pet. App. 5a, ¶ 8), respondents assert (p. 8, n.6b) that the bargaining unit was "affiliated" with predominantly male "national unions" and that collective bargaining was "managed" by male representatives of the national union. The first statement is accurate but irrelevant; the second is unsupported by citation and is contradicted by the record.

What is controlling is the express finding that the stewardesses exercised their "numerical superiority over males in the affairs of the class or craft and the union representative" by selecting their representatives, stating their "views and proposals" in connection with collective bargaining, ratifying new contracts, and "otherwise . . . participat[ing] in the process by which their rates of pay, rules and working conditions are established" (Pet. App. 5a, ¶ 8).

make (Pet. 10) is that the legal standards formulated by the court of appeals are ones that will impose "the highest conceivable liability," not just on Northwest, but on any defendant in a sex discrimination case. Respondents do not and cannot contest that proposition, nor can they deny that it creates substantial practical reasons for review by this Court.

Sixth, without denying that the size of the judgment in this case is extraordinary and perhaps unprecedented, respondents contend (Br. in Opp. 5) that this is "simply a reflection of the extent to which the members of the plaintiff class have been harmed by Northwest's unlawful conduct." That argument underscores the essential irrationality of the result reached by the courts below in re-examining and rejecting the wage scales set through *bona fide* collective bargaining. During many years of bargaining the stewardesses' unions agreed that a fair wage for the work performed by stewardesses was the one embodied in the contract, while simultaneously agreeing that the fair wage for the numerically insignificant class of pursers — represented by the same union — should be higher. In overturning decades of full, free collective bargaining on this subject, the courts below rejected the conventional process for determining the fair value of wages and ordered wages for the huge stewardess class raised retroactively to the levels considered appropriate only for the relatively few people performing pursers' duties. It is somewhat disingenuous, therefore, to characterize the "compensation" for this "harm" as anything more than an utterly unanticipated windfall.

Seventh, and finally, respondents argue that the legislative policies included in 29 U.S.C. § 251 have nothing to do with this case because those policies only explain why Congress overturned the "portal-to-portal" cases of the 1940's. The legislative findings, however, are part of the Fair Labor Standards Act ("FLSA"), which includes the Equal Pay Act. They establish basic policies that the courts are to apply in construing *various* provisions of the FLSA so as to *avoid* the types of

abuses reached in the portal-to-portal cases, where determinations of unanticipated liabilities conferred windfall recoveries beyond the expectation of either employers or employees. Section 251 is fully applicable here to guide the courts along the path abandoned by the courts below.

I

To Northwest's contention that the Equal Pay Act cannot apply to salary differentials established in a *bona fide* collective bargaining agreement and without discriminatory intent, respondents interpose three answers: first, that Northwest did not timely raise this contention in the courts below; second, that the factual predicate for the argument was never established; and third, that in any event the argument is legally "frivolous" (Br. in Opp. 6). None of these rejoinders has merit.

(a) **The Issue Was Raised and Decided.** Northwest placed in issue its lack of intent to discriminate under the Equal Pay Act at the first opportunity, namely, in its answer to the complaint. In specification 8, respondents alleged that Northwest had discriminated "solely upon sex" in violation of the Equal Pay Act by paying pursers more than stewardesses. In specification 8 of its answer, Northwest denied this allegation. In addition, both parties presented evidence on the collective bargaining agreements, and there were findings by the district court concerning those agreements and the collective bargaining history. Finally, the court of appeals actually passed on, and ultimately rejected, Northwest's contention that the lack of discriminatory intent was demonstrated by the existence of the *bona fide* collective bargaining agreement (Pet. App. 24c-25c). The issue thus was adequately raised in the trial court and was clearly framed and expressly decided by the court of appeals.

(b) **The Facts Support the Issue.** Respondents also claim that the record is devoid of any facts to support the proposition that the flight attendants' union and Northwest evaluated the purser and stewardess positions during the course of the

collective bargaining process. This defect, according to respondents, precludes a holding that the collective bargaining agreement established the same *bona fide*, non-sex basis for the differential as would a job evaluation plan.

This argument misses the point. In *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195-205 (1974), this Court held that a formal job evaluation plan established unilaterally by an employer immunizes the employer from liability under the Equal Pay Act, because it refutes conclusively any allegation that such differentials resulted from an intent to discriminate "on the basis of sex." The formality of the evaluation is not important; what is crucial is that there is compelling evidence that a pay differential is not sex-based, but rather is based on perceived differences in the jobs. The same conclusion flows from the good-faith concurrence of employer and unions that the fair wages for two jobs perceived to be different should also be different.

Moreover, in this case the collective bargaining agreements concluded between Northwest and the cabin attendants' unions did include job descriptions outlining the duties and responsibilities of pursers and stewardesses. Those descriptions (*see* Pet. 6-7) reflected an awareness of significant differences. Thus, far from being "barren," the record establishes conclusively that the pay differential between stewardesses and pursers was established by collective bargaining agreement that reflected a *bona fide* — and thus conclusive — understanding that the jobs were different.

(c) **Discriminatory Intent is Essential.** Respondents' arguments on the merits are no more availing. To Northwest's contention that proof of an intent to discriminate is an integral part of the plaintiff's case in a suit brought under the Equal Pay Act, respondents advance three basic objections. First, they claim that the language and structure of the Equal Pay Act will not bear such a reading. Second, they argue that a requirement of intent would be inconsistent with 29 U.S.C. § 260, which

allows an employer who has violated any provision of the FLSA to avoid paying double damages if his violation was committed in "good faith." Finally, they contend that the courts below in effect found that Northwest had intended to discriminate in establishing the pay differential between pursers and stewardesses.

It is simply not true, as respondents claim, that the language of the Equal Pay Act frees a plaintiff from the obligation to prove an intent to discriminate. The Act makes it illegal to "discriminate . . . on the basis of sex," and the operative verb "discriminate" inescapably implies a notion of intention. There cannot be discrimination within the meaning of the Equal Pay Act if the wage differential is not based on sex.[3] Moreover, it would be anomalous if a sex-discrimination plaintiff under the Equal Pay Act could recover without proving an intent to discriminate, even though race-discrimination or sex-discrimination plaintiffs suing under the more comprehensive provisions of Title VII of the Civil Rights Act of 1964 must, as this Court has recently held, make just that showing. *E.g., National Education Association* v. *South Carolina,* 46 U.S.L.W. 3452 (January 17, 1978); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335 n.15 (1977); *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 136 (1976). There is no evidence that Congress intended to vary the plaintiff's burdens between two antidiscrimination acts passed within one year of each other, and certainly nothing to

[3] Respondents claim that even if the lack of an intent to discriminate could defeat an Equal Pay Act claim, it would have to be pleaded and proved as an affirmative defense. Br. in Opp. 16-17. Because intent is an indispensible element of the plaintiff's case, however, respondents' argument is misplaced. *See Cayce* v. *Adams,* 439 F. Supp. 606, 608 n.1 (D.D.C. 1977) (Gesell, J.): "The exception [for a 'differential based on any other factor than sex,' 29 U.S.C. § 206(d)(1)(iv)] itself seems redundant, since the statute only prohibits 'discriminat[ion] . . . between employees *on the basis of sex*' (emphasis added). Obviously, if discrimination is 'based on any other factor other than sex' then it is not 'on the basis of sex' and vice versa."

suggest that the *later* Act was to be more restrictive than the earlier. It is not surprising, therefore, that respondents do not cite, let alone discuss, *any* of the recent cases in which this Court has clarified the requisites of recovery in discrimination cases — including proof of an intent to discriminate on the prohibited basis.

Respondents contend that, because no provision in the Equal Pay Act explicitly immunizes pay differentials established pursuant to collective bargaining agreements, Northwest is seeking to "secure by judicial fiat what industry sought and did not get from Congress" (Br. in Opp. 8-19). That industry sought *explicit* treatment of this issue, however, is not dispositive. In the first place, respondents do not point to any legislative history establishing that Congress had the *contrary* intention or specifically rejected the principle that some witnesses suggested should be expressly protected. As this Court's decision in *Corning Glass* shows, Congress' failure to include explicit language is no proof that the underlying concept has been rejected. While there is no explicit provision in the Equal Pay Act exempting pay differentials established by *bona fide* job evaluations, this Court held in *Corning Glass, supra,* 417 U.S. at 201, that such evaluations would be immune under the Act.

Respondents also assert that, instead of according protection for collectively bargained differentials, Congress included 29 U.S.C. § 206(d)(2), which forbids labor unions from causing wage discrimination based on sex (*see* Br. in Opp. 9). Far from suggesting that Congress contemplated that an employer would be held liable for a pay differential established by a collective bargaining agreement in the absence of proof of an intent to discriminate, the inclusion of Section 206(d)(2) establishes exactly the opposite: it provides that a union as well as an employer can be held liable under the Act so long as the requisite intent is shown. The presence of this provision underscores our argument: if a union agrees to a collective bargaining contract embodying wage differentials, the rationale of *Corning Glass* compels the conclusion that the differentials

are *not* "sex-based discrimination" unless the plaintiff specifically proves that the union and employer were animated by a discriminatory motive.

The requirement that an Equal Pay Act claimant prove an intent to discriminate is not inconsistent, as respondents contend, with 29 U.S.C. § 260, allowing a "good faith" defense to double damages. Respondents stretch too far in reading the "good faith" provision in Section 260 as rendering intent and purpose irrelevant under the Equal Pay Act itself. Some provisions of the FLSA create liability without fault or intent; we contend the Equal Pay Act is not one of them. Section 260 — which, as part of the Portal-to-Portal Act of 1947, was enacted some sixteen years prior to passage of the Equal Pay Act — was primarily designed to ameliorate the harsh burden on employers imposed by those provisions of the FLSA that created liability without fault. Nothing in the legislative history of the Equal Pay Act indicates that Congress focused on the relationship between that Act and Section 260, and there is nothing inconsistent between (a) inclusion of a provision that is applicable to all those prohibitions in multifaceted statute that impose liability without fault, and (b) enactment of other prohibitions that require a showing of intent.[4]

Respondents' argument also would prove too much. This Court held in *Corning Glass, supra,* 417 U.S. at 201, that a *bona fide* job evaluation plan immunizes an employer from liability under the Equal Pay Act. If Section 260 were inconsistent with the need to prove discriminatory intent in a case involving collectively bargained differentials, there would have been no room in *Corning Glass* for the Court to treat a *bona fide*

[4] An act may be intentional for Equal Pay Act purposes but still be in "good faith" within the meaning of Section 260. For example, an employer might intend to treat women differently from men in the good-faith, but mistaken belief that he was justified by business reasons that made gender a relevant distinction. Such an employer might be liable under the Equal Pay Act if gender were not a legitimate distinction, but could escape double damages because his judgment was made in good faith.

unilateral job evaluation plan as outside the coverage of the Act.

Respondents make much of findings that supposedly would support a conclusion that Northwest had "engaged in a pattern of intentional sex discrimination" (Br. in Opp. 11). The courts below did not make any such finding, and this Court, if it determines that discriminatory intent was a requisite element, cannot supply it.

The adverse conclusion drawn by the courts below (Pet. App. 55a, ¶ 78; 56a, ¶ 2; 33c-39c) resulted from the legally erroneous syllogism, based upon a misreading of the Equal Pay Act, that if Northwest paid stewardesses less than it paid pursers and if the two jobs were in fact the same, then Northwest *must* have been guilty of discriminating on the basis of sex. Completely omitted from this analysis, however, is the key question whether Northwest actually believed in good faith the two jobs were different and based the differential on that (allegedly mistaken) belief. The courts below necessarily found this question of intent legally irrelevant because they also found that Northwest did believe in good faith that the jobs were different (Pet. App. 1b-2b).[5] The courts below evidently treated the question of discriminatory intent as irrelevant under the Equal Pay Act. To the extent there is any finding of fact on this precise issue, it *supports* Northwest. Accordingly, the legal issue is squarely framed for review by this Court.

II

Northwest argued in its petition (Pet. 20-25) that the courts below improperly resorted to a test of job comparability — and thereby concluded that the supervisory functions of pursers are "less important" than the functions they bear in common with stewardesses — rather than restricting them-

[5] The court of appeals did not overturn the factual findings about what Northwest actually believed, but simply discounted the legal sufficiency of that belief under 29 U.S.C. § 260 (Pet. App. 62c-68c).

selves, as required by the statute, to determining whether jobs are *equal* in each of the critical respects: skill, effort and *responsibility*. Respondents' sole response (Br. in Opp. 19-20) is that the district court "as a matter of fact" rejected the contention that pursers as a group had extra responsibility and, thus, that there is no factual predicate for the issue presented. Significantly, they do not question Northwest's analysis of the limited role courts must play in passing upon job equality.

The record, however, will not support this attempt to downplay the free-wheeling approach taken by the district court and the court of appeals. Both courts below identified the existence and exercise of supervisory responsibility by pursers (Pet. App. 48a-51a; 15c-16c, 37c-39c). For example, the district court found that, "[a]s automatic 'senior cabin attendants' on all flights to which pursers were assigned, pursers are 'responsible and accountable for the entire cabin service staff'" (Pet. App. 50a, ¶ 69).[6] The district court and the court of appeals were able to avoid the clear implication of these findings that pursers as a group bear additional supervisory responsibility only by concluding that the supervisory functions "are less important than, and require no greater skill, effort or responsibility, than the other functions assigned to all cabin attendants" (Pet. App. 51a, ¶ 69; 37c-38c). Yet, it is precisely this type of calculus that Congress expressly rejected in choosing "equal work" rather than "comparable work" as the governing standard (*see* Pet. 21). At least two other circuits have condemned the use of that calculus. *See Angelo* v. *Bacharach Instrument Co.*, 555 F.2d 1164, 1173-76 (3d Cir. 1977); *Hodgson* v. *Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1258 (5th Cir. 1972).

[6] Respondents acknowledge some of the supervisory responsibilities of pursers (*see* Br. in Opp. 22 n.26), but attempt to denigrate the duties by claiming that they do "not involve an exercise of discretion . . . ." It is ludicrous to suggest that duties of "monitoring and where necessary correcting the work of other cabin attendants" and moving "attendants from section to section to balance workloads" do not require the exercise of discretion.

It is no answer (*see* Br. in Opp. 22-23) that stewardesses act as senior cabin attendants on flights on which there are no pursers. Even then, unlike pursers, they are " 'accountable' only for the conduct of service in the section of the aircraft to which assigned" (Pet. App. 50a-51a, ¶ 69; *see also* Pet. App. 14c-15c). But, more importantly, as Northwest explained in its petition (Pet. 8-9), a purser is always the senior cabin attendant on a flight staffed with a purser. The occasions on which a particular stewardess may assume supervisory responsibilities, however, are only random and sporadic. Thus, unlike stewardesses as a class, pursers as a class exercise supervisory responsibility whenever they fly,[7] and Northwest is entitled under the Equal Pay Act to recognize this additional obligation through higher pay for the class.[8]

Nor is it any answer to say that pursers are called on only infrequently to exercise their authority overtly. *See Hodgson* v. *Golden Isles Convalescent Homes, Inc., supra,* 468 F.2d at 1258. Once the courts determine that the functions differ in terms of responsibility, it is not up to them to evaluate the "amount" of differential. The jobs are not "equal," and the inquiry under the Equal Pay Act is properly at an end.

III

In asserting that this Court should not disturb the determination that Northwest's establishment of the pay differential was "willful," respondents argue against a proposition that Northwest did *not* advance in the petition. They allege that "Northwest seeks review . . . contending that a violation cannot be 'willful' unless committed in bad faith" (Br. in Opp. 24).

[7] On limited occasions, a flight will be staffed with more than one purser, the senior purser assuming the supervisory responsibilities (Pet. App. 30a-31a, ¶ 41(f)).

[8] There is simply no legal requirement, contrary to respondents' suggestion (Br. in Opp. 22), that Northwest must compensate stewardesses for this sporadic extra service through higher pay on a flight-by-flight basis. *See* Pet. 24 n.13.

Rather than arguing that "willful" conduct requires a showing of "bad faith," Northwest has urged that willfulness means the "*intentional* violation of a *known* legal duty" (Pet. 27) — the definition this Court has given the word "willful" in other regulatory statutes. *E.g., United States* v. *Pomponio,* 429 U.S. 10, 12 (1976); *United States* v. *Bishop,* 412 U.S. 346, 360 (1973). Respondents have totally ignored these recent cases.

There is no doubt that the court below failed to apply this definition and instead adopted one that virtually amounts to strict liability. The opinion of the court of appeals expressly states that an employer has acted "willfully" when he "consciously and voluntarily charts a course which turns out to be wrong" (Pet. App. 59c). It is clear, moreover, that the court meant what it said: the decision below allows a finding of willfulness even if an employer reasonably believed that his conduct did not violate the Equal Pay Act.[9]

If expanded civil, and possibly criminal, liability can be imposed upon an employer who "consciously and voluntarily charts a course which turns out to be wrong," that result should only be decreed after plenary consideration by this Court. The court of appeals, moreover, acknowledged a lack of authoritative guidance in this area, indicating that it was not adopting either of "two divergent views" expressed by other circuits (Pet. App. 51c). This Court's pronouncement is now necessary for clarification.

Review on this issue is important whether or not the Court concludes, as urged in Part I, that there can be no Equal Pay

[9] The court of appeals affirmed the district court's conclusion that the Equal Pay Act violation was "willful" and remanded for consideration the district court's determination that Northwest had acted with reasonable, good faith belief that the pay differential was lawful. Although we contend in Part IV that the tests required by the court of appeals for reconsidering Northwest's good faith are impermissibly narrow, the court left open the possibility — actually reached in the district court's initial decision — that Northwest's conduct was both "willful" and *bona fide*.

Act violation in the absence of an intent to discriminate on the basis of sex. If the Court does conclude that discriminatory intent is necessary for liability, the general "willfulness" standard governing the claims period in all FLSA litigation will remain a distinct issue to be confronted in Equal Pay Act cases. Intent and willfulness are not necessarily synonymous. The definition this Court has given in other contexts requires, as a prerequisite to establishing "willful" conduct, not only proof of intent to discriminate, but also knowledge of the legal obligation that forbids the discrimination. If, on the other hand, the Court permits an Equal Pay Act violation to be found in the absence of intent to discriminate on the basis of sex, the gap between the elements of EPA liability and the extension of the claims period will be even deeper. Only a correct interpretation of the "willfulness" requirement will protect from expanded civil, and possibly criminal liability, the employer who, though acting in reasonable good faith, simply "turns out to be wrong."

IV

Under 29 U.S.C. § 260, an employer's presumptive liability for double damages may be reduced to single damages if he acted "in good faith" and had "reasonable grounds" for believing that his actions were lawful. In opposing review of the appellate court's rejection of the standards articulated by the district court in applying the statute (Pet. App. 66c), respondents offer their own interpretation of the decision below. The four factors disapproved by the court of appeals may, respondents say, be considered in determining whether the employer subjectively held a "good faith" belief that his actions were lawful, but *not* in determining whether he had "reasonable grounds" for that belief (Br. in Opp. 28-29, 31-32).

The tortured explanation proffered by respondents is just as much at odds with the statute — and with common sense — as the unembellished disavowal by the court below. What, indeed, could be more relevant to an assessment of reasonableness of the employer's belief than the practice of other

employers and the expectations of his own employees, as manifested by their conduct? These are precisely the kinds of external factors against which any employer is likely to test his belief that certain conduct is lawful and reasonable.

Yet the decision below requires the trier of fact to blind itself to these factors in making the reasonableness determination on which the factors indisputably bear. In excluding these factors, the court below observed (in a passage respondents emphasize, Br. in Opp. 29) that an entire industry may be acting unreasonably and that employee acquiescence may be explained as mere timidity. But those are arguments that an Equal Pay Act plaintiff can make to the trier of fact — and respondents did make such arguments to the district court here, only to have the issue resolved in Northwest's favor. They are *not* reasons for stacking the deck against the employer by entirely excluding the factors from consideration.[10]

Repeating the statement by the court below that "legal uncertainty" is the touchstone, respondents assert that Section 260 protects only the employer who reviews the law and finds inconsistent precedents addressing his conduct, some supporting his position and some *challenging* it. This interpretation would, if accepted, result in foolish anomaly: Section 260 would protect an employer who reviews the law and finds some authority calling his conduct into question, but would offer no protection to an employer who, on the basis of industry practice

[10] *Compare, e.g., Texas & Pacific Railway* v. *Behymer,* 189 U.S. 468, 470 (1903) (Holmes, J.) ("what usually is done may be evidence of what ought to be done"); *The T.J. Hooper,* 60 F.2d 737, 740 (2d Cir.), *cert. denied,* 287 U.S. 662 (1932) (L. Hand, J.) (industry practices and usage are "persuasive" evidence of reasonableness of one worker's conduct, even though they may not constitute the "final answer").

Throughout the entire body of tort law, courts in deciding whether a person's conduct is reasonable almost invariably look to the conduct of others similarly situated and the expectations of other participants in transactions like the one in question. *See, e.g.,* W. Prosser, *Law of Torts* 166-76 (4th ed. 1971).

and his own experience in collective bargaining with his own employees, reasonably concludes that there is no basis to inquire further. No justification for that anomaly appears in the statute or its legislative history, and respondents offer no reason why Congress would have wished to create it.

The very factors ruled irrelevant by the court below are factors Congress emphasized in the declaration of policy (29 U.S.C. § 251) contained in the 1947 Portal-to-Portal Amendments to the FLSA, of which Section 260 is a part. Respondents contend that the declaration of policy only explains why Congress retroactively overruled this Court's Portal-to-Portal "travel time" decisions under the FLSA and is irrelevant in interpreting Section 260 (Br. in Opp. 31-32), but that argument is not supported by authority or logic.

Respondents cite no case holding that a congressional declaration of policy in a comprehensive statute is to be totally ignored in construing some of its provisions, and we are aware of none. More fundamentally, it is totally illogical to argue, as respondents do, that "long-established customs, practices, and contracts between employers and employees" were so important that Congress took the extraordinary step of retroactively overruling judicial decisions disregarding them, and yet at the same time Congress intended to permit the courts to disregard "customs, practices, and contracts" in future decisions under the FLSA (of which the Equal Pay Act is a part). The congressional declaration of policy codified in Section 251 stands as a continuing admonition to the courts not to override arrangements fairly arrived at through collective bargaining. The court below not only disregarded that admonition, but ruled those considerations *irrelevant.* [11]

[11] The protection offered by Section 260 could still be applicable in an Equal Pay Act case if the Court accepts the position — advanced under Part I — that a violation of the Act requires proof of an intent to discriminate on the basis of sex. An employer who establishes a pay differential with an intent to distinguish on the basis of sex may nevertheless entertain a good faith belief that his actions are lawful —

(continued on next page)

V

There is little need for an extended discussion of Northwest's claim that the court of appeals ignored settled precedent and clear legislative history in failing to apply the 1972 amendment to Title VII limiting backpay awards to the two years preceding the filing of a charge with the EEOC. Respondents have not taken issue with Northwest's exposition of the legislative history of Section 14 of the 1972 amendments, which demonstrates that the court below erred in finding a congressional intent to make the new backpay limitations inapplicable to pending cases. The precedents of this Court are clear that in the absence of such intent, the courts must apply the law in effect at the time they render their decisions, not the law at the time the claim arose.

Whether or not this issue, standing alone, would warrant review by this Court, it is an important issue in the context of this case and presents a simple, clear-cut legal question that turns solely upon a matter of statutory interpretation. It should be decided if certiorari is granted on the other issues.

VI

In opposing review of the sixth question, respondents do not deny that the court below erred in holding that the 90-day

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believing, for example, that his employees are not covered by the Equal Pay Act or that gender is a legitimate factor in the peculiar circumstances. Section 260 would provide a basis on which the trial court would have the discretion to assess single damages rather than double damages.

On the other hand, if the Court allows the decision below to stand insofar as it finds a violation of the Equal Pay Act, then review of the court of appeals' interpretation of Section 260 is critical, for this provision will remain as one of the few safeguards providing a measure of protection to employers who reasonably and in good faith conclude that differentially-compensated jobs are different, but then have those beliefs second-guessed and found erroneous.

EEOC filing requirement was not jurisdictional and was subject to equitable modification. Rather, they oppose review on the grounds (a) that the facts are *sui generis*, (b) that no employee may be able to demonstrate reliance and thus take advantage of the estoppel imposed by the court of appeals, and (c) that the court of appeals in any event could have reached a similar result by tolling the Equal Pay Act claims rather than enlarging the Title VII class.

(a) The precise nature of the facts that might support an estoppel is irrelevant to the legal issue presented: Is the EEOC filing requirement a jurisdictional prerequisite or is it subject to "estoppel"?[12]

(b) If the Court grants review of the other issues, this issue should be decided as well to prevent any costly and unnecessary "reliance" hearings as contemplated by the court of appeals. Even respondents concede that those hearings may be pointless, even though as class representatives they would apparently be obliged to pursue them.

(c) Finally, it is somewhat surprising to see a suggestion that the court of appeals fixed upon the wrong remedy since it could have applied the "estoppel" to the Equal Pay Act claims. This belated, though imaginative suggestion, would not in fact leave the case in the same posture, even if the idea had any merit of its own. An estoppel under the Title VII claims would take effect in a certified class action, but because of the "opt in" requirements of the FLSA, 29 U.S.C. § 216(b), there can be no class action for Equal Pay Act claimants. Such claimants are required to opt in affirmatively and prove their own claims. Different, but no less difficult, questions would be raised by respondents' suggestion that perhaps the "estoppel" should

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[12] Significantly, respondents concede that they authored the class action notices that the court of appeals found misleading. *See* Br. in Opp. 35 n.45. Since respondents — the class representatives — were responsible for any detrimental reliance, there is no factual justification for estopping Northwest from raising the time bar. *See* Pet. 37 n.24.

have been directed at potential EPA claimants. Their comment is simply a transparent attempt to divert attention from the clear conflict between what the court of appeals actually has done and what it had the authority to do in light of this Court's treatment of the Title VII filing requirements. The cavalier ruling of the court of appeals enlarging the Title VII class could have a significant impact on the ultimate judgment if left standing.

Conclusion

Certiorari should be granted. The judgment below should either be summarily vacated in light of its inconsistency with intervening decisions of this Court or the case should be set for plenary consideration.

Respectfully submitted.

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January 30, 1978